Supreme Court, U.S.
FILED

941314 JAN 31 1995

No. _____

OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

October Term, 1994

CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

Cross-Petitioners,

v.

JOINT SCHOOL DISTRICT NO. 241, BOARD OF TRUSTEES OF DISTRICT NO. 241; TRENT WOODS, Chairperson of said Board; AL ARNZEN, Superintendent,

Respondents,

v.

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

Stanley D. Crow
Counsel of Record
3776 LaFontana Way
P.O. Box 972
Boise, Idaho 83701-0972
(208) 345-7561

Alexis I. Crow
THE RUTHERFORD INSTITUTE
John W. Whitehead
Mark J. Beutler
1445 East Rio Road
P.O. Box 7482
Charlottesville, VA 22901
(804)978-3888

Balmar Legal Publishing Department, Washington, D.C. (202)682-98090

QUESTIONS PRESENTED

1. May A School District Allow The Graduating Senior Class To Decide The Content Of High School Graduation Ceremonies, Including The Inclusion Or Exclusion Of Non-secular Material, Without Violating The Establishment Clause Of The United States Constitution?

2. Does The Inclusion Of Non-Secular Material In Graduation Ceremonies Represent Coercive State Action If Such Material Is Included Pursuant To A Vote Among Graduating Seniors And If The Graduation Program Contains A Disclaimer Informing Attendees That The School Board Neither Endorses Nor Opposes The Content Of The Graduation Ceremonies?

3. Does The First Amendment Permit Or Require Government Officials To Remove Religious Expression From The Speeches Of All Individuals Who Deliver An Address At A High School Graduation Ceremony Where Graduating Seniors, Without Direction From The School, Make All Decisions As To The Content Of The Ceremony?

LIST OF PARTIES

The Petition for Writ of Certiorari accurately lists the parties to this proceeding, except that Respondent Antoine Jesse Heath was inaccurately listed as Antoine Jessee Heath.

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CITIZENS PRESERVING AMERICA'S HERITAGE, INC., an Idaho corporation; ANTOINE JESSE HEATH; KARLA FREI; MAUREEN SLICHTER (by and through LEON SLICHTER, parent); CHAD GRAVES; GINA ENGLE; SHERRY COXEN by and through JACK BREEN, guardian); MARIA LOWRY, by and through ROBERT LOWRY, parent); MIKE McCARLEY; and TINA LAWRENCE,

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Respondents,

v.

PHYLLIS WRIGHT HARRIS, on her own behalf and on behalf of her two children, BEVERLY HARRIS BUTLER, and SAMUEL HARRIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 12.3 of the Rules of this Court, Citizens Preserving America's Heritage, Inc., *et al.* ("Cross-Petitioners"), file this Cross-Petition and respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit in this case. This Cross-Petition is

unconditional and independent of the Petition for Writ of Certiorari (the "Petition") in that Cross-Petitioners pray that the writ be issued irrespective of whether the Petition is issued.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is reproduced in the appendix to the Petition at App. A. The opinion of the United States District Court for the District of Idaho is reported at 821 F. Supp. 638, and is reproduced in the appendix to the Petition at App. 2.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1994. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Federal jurisdiction in the first instance was obtained pursuant to 28 U.S.C. § 1343(3) in the District Court, and pursuant to 28 U.S.C. § 1291 in the Ninth Circuit Court of Appeals. Counsel for Cross-Petitioners first received the initial Petition for Writ of Certiorari on January 26, 1995.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petition correctly lists the statutory and constitutional provisions implicated in the Petition and this Cross-Petition.

STATEMENT OF THE CASE

The Petition accurately sets forth the statement of the case except that it erroneously states that the District Court "granted summary judgment in favor of Petitioners and Respondent Intervenors." Petition, at 8. The District Court granted summary judgment in favor of only Cross-Petitioners (Respondent-Intervenors), not in favor of Petitioners, who had not moved for

summary judgement. *See* App.*A, at 16.

Cross-Petitioners add that no one who attends a graduation ceremony in District No. 241 is ever asked to participate in any prayer during the graduation ceremony either by standing, bowing one's head, removing one's hat, or saying or doing anything.

In addition, Cross-Petitioners summarize the decisions in the courts below.

1. The District Court Decision

The District Court began its analysis with a discussion of the United States Supreme Court's decision in *Lee v. Weisman*. App. A, 4-7 (quoting extensively from *Lee*, 112 S. Ct. 2649 (1992)). The District Court quoted several passages from *Lee* wherein the Supreme Court stressed the "direct and complete" control exercised by the public school faculty and public school administrators over the graduation prayers at issue in *Lee*. The court noted that in *Lee*, a school official (the principal) determined that an invocation and a benediction should be given. The principal selected the clergyman who would deliver the prayer and supplied him with officially-approved guidelines for the prayer. According to the District Court in *Harris*, because of the pervasive involvement of government officials in the religious activities occurring at the commencement ceremony at issue in *Lee*, the *Lee* Court held that the graduation prayer violated the Establishment Clause.

The District Court in *Harris* held that the decision in *Lee* did not control the present dispute. App. A, at 6. In the graduation ceremony at Grangeville High School and at other high schools in District 241, unlike in the ceremony in *Lee*, the students were free to determine whether an invocation or benediction would be included in the ceremony, who would deliver any such message, and what the content of that message would be. App. A, at 13. Because the decision to include a religious

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* Unless otherwise indicated, all references to appendices refer to the appendices to the Petition.

message in the graduation ceremony was made by students, not the school, that decision was not governed by the Establishment Clause. *Id.* The District Court analogized to this Court's decision in *Board of Education of Westside Community School v. Mergens* for the operative principle:

> [T]here is a crucial difference between *government* speech endorsing religion which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.

App. A, at 13 (quoting *Mergens*, 496 U.S. 226, 250 (1990)).

The District Court rejected the argument urged upon the court by the Respondents, Phyllis Wright Harris, *et al.* (the "Respondents"),that because the faculty and administrators supervised the graduation ceremony, the decision to pray during the graduation ceremony and the content of the prayer were somehow attributable to the state. App. A, at 13. The court also rejected the Respondents' argument that because the school district allowed students to vote on whether or not to include a prayer in the graduation ceremony, the state was somehow impermissibly "entangled" with religion. App. A, at 14.

Because the invocation and benediction that occurred at the graduation ceremony at Grangeville High School was the decision of the students, and not that of the school district or its employees, the District Court concluded that the religious expression did not violate the Establishment Clause.

2. The Court Of Appeals Decision

A majority of the Court of Appeals for the Ninth Circuit, over a dissenting opinion by Judge W. Wright, reversed the decision of the District Court. Judge Wiggins, writing for the

panel majority, held that because a student could avoid the religious message only at the cost of foregoing his or her graduation ceremony, the graduation prayer was coercive. App. B, at 28-29. In addition, the court held that the governmental involvement in the invocation and benediction was sufficiently pervasive to trigger the government's obligations under the Establishment Clause. App. B, at 21-22. For these two reasons, the majority concluded that the Establishment Clause was violated.

The majority held that the school ultimately controls the graduation ceremony. App. B, at 21. The majority reasoned that graduating seniors have authority to make decisions regarding the content of the graduation ceremony only because the school allows them to have it. In addition, the majority found significant the fact that the school district subsidized the graduation ceremony. *Id.* The school district offered to the graduating senior class the school facilities, at no cost, and incurred other expenses in connection with the ceremony. For these reasons, the majority concluded that the graduation ceremony was ultimately a school-controlled and school-sponsored event. Therefore, the students' decision to include an invocation or benediction in the graduation ceremony and the students' authority to prescribe their content properly were attributable to the school district. App. B, at 28.

The majority rejected the Petitioners' and Cross-Petitioners' argument that the invocation and benediction were student-initiated and therefore not restricted by the Establishment Clause. The majority reasoned that school officials could not divest themselves of constitutional obligations by permitting students to make decisions as to the content of any graduation speech. App. B, at 23. The majority distinguished this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Lamb's Chapel v. Center Moriches School District*, 113 S. Ct. 2141 (1993), and *Board of Education of Westside Community School*

v. Mergens, 496 U.S. 226 (1990). App. B, at 27. The majority noted that those cases involved open fora whereas this case, in contrast, did not involve an open forum because only speakers chosen by a majority of the senior class were permitted to speak at the graduation ceremony. The panel majority concluded that a forum that allows only selected speakers to convey a particular message without permitting others to speak is not open for purposes of First Amendment open-forum doctrine.

The majority also held that the school district's actions with respect to the graduation ceremony failed to advance a secular purpose and also had the primary effect of advancing religion and therefore violated the standards set forth by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). App. B, at 29-31.

In dissent, Judge Wright held that the limited role of the school district in fashioning the content of the graduation ceremony caused the case to fall outside the rule articulated by the Supreme Court in *Lee*. App. B, at 33 (Wright, J., dissenting). Judge Wright concluded that based on the precedent of *Lee*, a school violates the Establishment Clause only when it exercises a high degree of control over graduation prayer which, in conjunction with the compelled nature of attendance at one's graduation ceremony, creates an unacceptable risk that students will be coerced to participate. App. B, at 35 (Wright, J., dissenting).

In reaching this conclusion, Judge Wright reasoned that prior Supreme Court precedents had established that custodial oversight and monitoring of religious meetings on school property did not make the religious activities that occurred in the meetings attributable to the state thereby implicating the Establishment Clause. App. B, at 35-35 (Wright, J., dissenting). Furthermore, because of the disclaimer printed in the commencement program and because the students were aware that any invocation or benediction delivered in connection with the commencement ceremony were the result of a majority vote of

the graduating seniors, all students and other graduation ceremony attendees would perceive that any religious expression included in the ceremony represented the preference of the students, and not that of the state. App. B, at 36 (Wright, J., dissenting). Accordingly there was no state imprimatur placed upon the delivery of any religious message. The school district merely accommodated the students' preference. Judge Wright therefore concluded that such accommodation did not endorse religious belief over disbelief, nor did it advance religion over non-religion. App. B, at 36-37 (Wright, J., dissenting). Rather, the school district's policy charted a neutral governmental course with respect to religion and demonstrated respect for the fundamental values of others. *Id.*

Judge Wright further urged the panel majority to follow the lead of the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993), where the Court of Appeals for the Fifth Circuit reached a contrary ruling on similar facts. App. B, at 34 (Wright, J., dissenting).

REASONS FOR GRANTING THE WRIT

This case presents primarily a conflict between two circuit courts of appeals over the proper construction of the Establishment Clause and the proper interpretation of this Court's decision in *Lee v. Weisman*. In addition, however, this case addresses even more difficult questions regarding the interrelationship between this Court's Establishment Clause jurisprudence, on the one hand, and this Court's Free Speech, Free Exercise and state action jurisprudence, on the other hand.

This Court has construed the Establishment Clause to forbid government endorsement of religion. This Court has also construed the Free Speech and Free Exercise clauses to bar government from using its coercive powers to interfere with an individual's profession and exercise of religion. In its Estab-

lishment Clause jurisprudence and also in other First Amendment contexts, this Court has held that government must remain neutral with regard to religion and religious speech.

As governmental entities, public schools must adhere to all of the mandates contained in the First Amendment. As the present controversy illustrates, schools often must navigate a very difficult course in honoring these constitutional safeguards. Public schools risk transgressing the Free Exercise and Free Speech provisions of the Constitution if they impose content-based and viewpoint-based restrictions on religious expression and target religious acts for unique prohibitions. The Establishment Clause, however, may require schools to impose such restrictions and prohibitions in certain situations. In the present context of student-initiated and student-directed invocations and benedictions included in public high school graduation ceremonies, the task of striking the balance among the First Amendment's clauses is especially difficult in light of the current conflicting case law.

In addition to reconciling the seemingly conflicting dictates of the Free Speech, Free Exercise, and Establishment Clauses, resolution of this present controversy may also have the effect of bringing the existing jurisprudence of graduation prayer into conformity with the definition of "state action" which this Court employs for purposes of the other constitutional principles under the Fourteenth Amendment.

Moreover, it is necessary for this Court to resolve this issue in order to avoid the further litigation that will now be necessary to define the lengths to which a school district must go to enforce against students and other private citizens who may speak at future commencement ceremonies the Ninth Circuit's ruling that school districts must not permit religious expression at graduation ceremonies.

1. There is a Conflict Among the Circuit Courts of Appeals and Among the District Courts

The decision below of the panel majority for the Ninth Circuit Court of Appeals conflicts with the unanimous decision of the Fifth Circuit Court of Appeals in *Jones v. Clear Creek Independent School District*, 997 F. 2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993). The facts in *Jones*, in all material respects, are similar to those in this case.[1] No court or litigant has suggested that the facts of the cases are distinguishable or the holdings of the Fifth and Ninth Circuits reconcilable.

The Petition describes more fully the two conflicting methods of analysis adopted by the courts of appeals for determining whether student-initiated and student-directed invocations and benedictions at a high school graduation ceremony conform to the Constitution's Establishment Clause. In short, the Fifth Circuit interprets this Court's decision in *Lee* as forbidding invocations and benedictions in high school graduation ceremonies only when the government exercises some measure of control over either the decision that graduation prayer should be offered or the content of any graduation prayer. The Ninth Circuit majority in *Harris*, however, holds that with regard to invocations and benedictions at graduation ceremonies, it matters not who utters them or who decides that they shall be uttered or what the content of those utterances shall be. According to the Ninth Circuit, if an invocation or benediction is delivered by anyone, the school is responsible and, to the extent the school fails to police the graduation ceremony to remove any prayer or religious expression delivered by or at the instance of the

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[1] There are differences in the facts of the cases, but those differences weigh in favor of permitting the student-initiated invocation and benediction at issue in this case. The school officials in *Jones* had more control over the graduation ceremony than do the school officials in this case. Therefore, the case for attributing the religious expression to the government is more compelling in *Jones* than in *Harris*.

students, the school fails to discharge the affirmative obligations placed on it by the Constitution's Establishment Clause.

The conflict between the Fifth Circuit and the Ninth Circuit panel majority is not confined to only these two circuits. In an unreported decision, the Court of Appeals for the Third Circuit enjoined student-initiated prayer at a graduation ceremony on reasoning similar to that employed in *Harris*. *See American Civil Liberties Union of New Jersey v. Blackhorse Pike Regional Board of Education*, No. 93-5368 (3d Cir., June 25, 1993).[2] Earlier this month, the Court of Appeals for the Seventh Circuit ruled that an injunction prohibiting graduation prayer did not apply to student-initiated graduation prayer. *See Goluba v. School District of Ripon*, No. 94-2010, 1995 U.S. App. LEXIS 467 (7th Cir., Jan. 11, 1995).[3]

There also are contradictory decisions among the federal district courts. The District Court for the Middle District of Florida (which sits in the Eleventh Circuit), in a case involving student-initiated graduation prayer, followed *Jones*. *See Adler v. Duval City School Board,* 851 F. Supp. 446 (1994). The District Court for the Eastern District of Virginia (which sits in the Fourth Circuit), in a case that pre-dates the Ninth Circuit's decision in *Harris*, followed the approach subsequently employed in *Harris*. *See Gearon v. Loudoun County School Board*, 844 F. Supp. 1097 (1993).

The attorneys general of the states, who are charged with the responsibility of advising their constituent school districts,

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[2] The Order is attached in the appendix to the Cross-Petition at App. 1. This Court, on order of Justice Souter acting as Circuit Judge, denied the school board's application for review and let the injunction stand. *Blackhorse Pike Regional Board of Education v. ACLU of New Jersey*, Application No. A-92-974 (3d Cir., June 28, 1993) (no opinion issued).

[3] Although the court ostensibly was interpreting the terms of a civil injunction, and not the Establishment Clause, the court nonetheless stated that the Establishment Clause jurisprudence would inform its understanding of the injunction. *Goluba*, at 6.

are also divided on the permissibility of student-initiated and student-directed prayer and other religious speech at high school graduation ceremonies. Specifically, the attorneys general of the states of Maryland,[4] Tennessee,[5] and Kansas[6] have interpreted this Court's decision in *Lee* to foreclose student-led prayer in its formal graduation ceremonies. Conversely, the attorney general of the State of Kentucky[7] has issued an opinion stating that, according to the precedent of *Lee*, some form of religious observance at a public school graduation ceremony is permissible, and so long as such observances are student-initiated and student-directed, they would not violate the Establishment Clause. Although divided on this issue, the attorneys general in these states are united in their dismay at the confusion in this area of the law.

The Fifth and Ninth Circuits have thus reached opposite conclusions about the constitutionality of student-initiated and student-directed invocations and benedictions included in public school commencement exercises. The Ninth Circuit Court of Appeals was itself in sharp disagreement about the constitutional analysis applicable in the public school graduation ceremonial context and about whether any form of prayer or religious expression in that setting — however much the school district distanced itself from the decision to include such expression in that ceremony — can survive when scrutinized under the appropriate First Amendment test. These incompatible views of the commands of the First Amendment have also been adopted

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4 93 Op. Att'y Gen. 050 (1993), 1993 Md. AG LEXIS 55 (December 3, 1993), at 16-20.

5 93 Op. Att'y Gen. 42 (1993), 1993 Tenn. AG LEXIS 42 (May 10, 1993).

6 93 Op. Att'y Gen. 42 (1993), 1993 Kan. AG LEXIS 70 (May 17, 1993).

7 *Prayer at School Graduation*, 93 Op. Att'y Gen. 55, 1994 Op. Atty Gen. Ky. LEXIS 84 (August 5, 1994).

in conflicting decisions of the federal district courts and in the opinions of the state attorneys general. Each view claims to find its support in this Court's decision in *Lee v. Weisman*.

2. Failure to Resolve the Conflict Among the Courts is Contrary to the Public Policy

Although this Court has recognized and articulated that it is possible for school districts to accommodate student religious speech without violating the Establishment Clause, there continues to be wide-spread confusion among school officials as to what constitutes protected expression and what constitutes forbidden expression. This confusion seems to be most pronounced in the context of student-initiated and student-directed high school graduation benedictions and invocations. This unresolved controversy among the courts is contrary to the public policy in that it interferes with proper school government and imposes unreasonable costs upon local school systems.

Predictably, the lack of a clear statement by the Supreme Court concerning student-initiated religious expression at public school graduation ceremonies and the conflict among the court decisions have created an environment ripe for intimidation and threats of legal action against financially distressed school districts. School boards, facing tight budgets, crowded classrooms, and inadequate textbooks, are increasingly unwilling to commit district funds to a defense of students' religious rights and instead simply yield to the threats of lawsuits from one side or the other. The decision in such a case is not, therefore, one reached through a discussion on the merits by the elected local policy makers in the affected school district; it is rather a decision that is imposed by partisans who use the financial burdens of the litigation process to coerce a decision.

Even a flat prohibition against religious speech and exercise no longer is a fiscally safe position for school districts. Several school districts have been sued under the First Amend-

ment for barring the practice of student-initiated prayer.[8] Moreover, in response to this Court's decision in *Lee v. Weisman*, and out of concern that schools might opt for a safe "no-prayer" policy for all public school events, a number of state legislatures have passed laws protecting the right of students to engage in student-initiated prayer and religious speech at school functions including graduation ceremonies.[9] The effect of such statutes is to create a cause of action when school officials decide to police graduation ceremonies to remove any student-initiated graduation prayer or expression.

State agencies and school officials are trapped in the middle of this dispute, not wishing to tread on students' religious freedoms, but finding insufficient guidance in the conflicting case law. Local school districts are forced to spend considerable amounts of time, energy and scarce taxpayers' dollars defending themselves on all fronts, regardless of which position they take in the public school graduation prayer conflict. Failure to address the issue at this time will result in continuation of litigation in several states, initiation of litigation in others, and

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[8] *School Gets Around Court's Ban on Prayer*, Wash. Times, at A1 (May 22, 1993) (reporting students' suit against an Indiana school district for banning prayer at graduation).

[9] *See e.g.*, Tenn. Pub. Acts 534, § 1(c), *amending* Tenn. Code Ann. § 49-6-1004 (1993); Ark. Stat. Ann. § 6-21-202(3) (1993); Miss. Code Ann. § 37-13-4 (1993); *see also* David E. Anderson, *"Pomp and Circumstance," Prayer Debates, Lawsuits*, St. Petersburg Times, at 10 (July 11, 1994):

> Since th[e Supreme Court's] ruling [in Lee], there has been a flurry of federal court lawsuits, actions in half-a-dozen state legislatures, and debates in other states and the District of Columbia. Six states — Georgia, Virginia, Mississippi, Alabama, Arkansas, and Tennessee — have approved bills on the subject . . . .

See also School Prayer Court Cases, Legislation, St. Petersburg Times, at 10 (June 11, 1994) (describing legislation pending in Florida, the District of Columbia, South Carolina, and Louisiana protecting student-initiated prayer in public school graduation ceremonies).

often a surrender by school officials to anyone who threatens litigation. Without a decisive resolution of the difficult First Amendment issues raised by religious expression at public high school ceremonies, the school systems and communities in our states will continue to be rent by disagreement over what the Constitution allows or prohibits, and financially hard-pressed states will have to expend substantial sums re-litigating the same issues through the state and federal court systems.

This Petition presents a straightforward and timely opportunity for the Court to consider the important Establishment Clause questions raised by school graduation prayers and to provide clear direction to state and local school officials about whether, and if so how, to allow student-initiated religious expression at graduation and other public ceremonies. At present, the decisions and supporting rationale are so divergent that there is no uniform standard upon which school districts and boards of education can confidently make choices, or upon which the states can offer counsel to their agencies and political subdivisions. Thus, the need for a clear determination is paramount. A decision by this Court would lay this divisive controversy to rest and prevent further diversion of resources into litigation and away from appropriate academic matters.

3. The Decision Below is in Conflict with this Court's State Action Precedents

This Court has never framed its analysis in Establishment Clause cases in terms of whether there was the requisite state action to make the clause applicable to the offending conduct. Rather, the Court has implicitly collapsed its state action analysis into its analysis of what conduct the Establishment Clause proscribes.[10] However, it was essentially a state action theory

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[10] *See* Laurence Tribe, *American Constitutional Law* § 18–7, at 1720 n.29 (1988).

upon which numerous important Establishment Clause cases turned.[11]

This case presents an opportunity to reconcile this Court's graduation prayer Establishment Clause decisions and its state action decisions. In this respect, this present dispute regarding the permissibility of student-initiated invocations and benedictions at graduation ceremonies has an analogue in this Court's sectarian school funding decisions. For decades, this Court's sectarian school funding decisions were in conflict. Within the last decade, however, in a line of decisions which includes *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462 (1993), this Court has substantially ameliorated that confusion. The rule articulated in *Zobrest* and *Witters* is that aid to sectarian education is permissible so long as the aid is provided under religiously neutral funding criteria. This rule, however, is simply an alternative formulation of a state action

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[11] *See Zobrest v. Catalina Foothills Sch. Dist.*, 113 S. Ct. 2462, 2467 (1993) ("Because the [government-funded education entitlement program] creates no financial incentive for parents to choose a sectarian school, a [government-paid sign-language] interpreter's presence there can not be attributed to *state decision making*.") (emphasis added); *Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) ("The government involvement with the religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school."); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 250 (1990); *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488 (1986) ("[T]he fact that aid goes to the individuals means that *the decision to support religious education is made by the individual, not the state*.") (emphasis added); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 337 & n.15 (1987) (Title VII's exemption for religious organizations upheld notwithstanding that exemption facilitated religious organizations' efforts at furthering religion because the government itself had not advanced the organizations' religious mission); *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (invalidating New York law requiring school prayer "because [the] prayer was composed by governmental officials as part of a governmental program to further religious beliefs").

test. So long as the funding conditions are religiously neutral, and the decision to commit the funds to sectarian education is made by private individuals, not the state, the Establishment Clause is not implicated. *Zobrest*, at 467; *Witters*, at 487.

The same analytic approach could be applied to the religious speech in public fora cases. The Establishment Clause is not abridged so long as no religious criterion is employed in granting access to the fora.[12] But this also is simply an alternative formulation of a state action test. So long as the grant or denial of access to the forum is not based on religious criteria, the decision to use the forum for religious purposes is made by one or more private individuals, not the state.

Cross-Petitioners submit that a state action approach is appropriate in the context of prayer and religious speech at school assemblies. In fact, the Ninth Circuit majority employed a state action analysis (albeit an erroneous analysis) in concluding that school officials could not absolve themselves of their constitutional duty by delegating their responsibilities to a non-governmental entity. *See Harris*, App. B, at 23-24. The majority cited several of this Court's state action decisions for this proposition. Notably, the most recent state action decision relied upon by the *Harris* majority was *Evans v. Newton*, 382 U.S. 296, 299 (1966). This Court's state action jurisprudence has undergone substantial change since *Evans*. More recent decisions from this Court go the other way.[13]

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[12] *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226 (1989); *Widmar v. Vincent*, 454 U.S. 263 (1981).

[13] *See, e.g., San Francisco Arts and Athletics v. U.S.O.C.*, 483 U.S. 522 (1987) (no state action where plaintiff failed to show how government exerted influence over private actor's decision to enforce trademark rights in discriminatory manner); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (state is not responsible for private decision unless it establishes the criteria for those decisions or coerces or encourages the specific conduct complained of); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (employment decisions of

Although all of these more recent cases support the same principle, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), will illustrate its application. In *Jackson*, an electric utility had a monopoly in its locality and its rates and service policies were extensively regulated by the state. Nonetheless, this Court rejected a plaintiff's claim that the Due Process Clause protected her from having her electric service discontinued for nonpayment without notice and fair hearing. This Court held that the conduct of the utility did not constitute state action because there was an insufficient relationship between the challenged actions of the utility and the state. 419 U.S. at 357-59. Constitutional limitations on government were therefore inapplicable.

According to *Jackson* and other cases, mere acquiescence by the state in private individuals' conduct does not constitute state action. The government must actively encourage or facilitate the private conduct, not merely tolerate it. This is true even where the state has the clear power to prevent the challenged private conduct, but chooses not to exercise that power. Where the state involvement with the private actor has nothing to do with the private acts being challenged, those private acts will not be governed by constitutional limits placed on government.

There are, accordingly, strong indications that this Court now embraces a state action jurisprudence whereby the Court will not find sufficient state action to implicate the relevant constitutional provision unless the act in question (in this case

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private schools receiving government grants are not state action where they are not compelled or influenced by any state regulation); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (no state action and therefore no due process obligation on private utility company's termination of service where government regulations neither commanded, sanctioned, nor encouraged the termination practice); *cf. NCAA v. Tarkanian*, 488 U.S. 179 (1988) (no state action and therefore no constitutional requirement of due process where private organization demanded suspension of public university's athletic coach and university acquiesced therein).

religious expression or exercise) is traceable to a government rule or decision. This examination is performed at the decision-making level at which a government actor is responsible for its formulation. If no government actor imposes a rule or makes a decision which possesses constitutionally forbidden characteristics, the conduct or decisions of any private individuals do not implicate the Constitution simply because the government permits that which it could not engage in itself.

In this case, the decision to include religious speech in the commencement ceremony was made by the students, not school officials. Although the students' decision was permitted by the school, it was not encouraged or coerced by the school. The majority in the decision below erred, therefore, in concluding that the invocation and benediction were school-sponsored and school-controlled. The court committed a similar error in holding that merely because the school subsidized the graduation ceremony and school officials attended the ceremony, the school was constitutionally responsible for the acts and decisions of the students which the school permitted. Neither does the fact that the graduation invocation and benediction advanced religion and were undertaken with a religious motive implicate the test articulated in *Lemon v. Kurtzman*. It may be that all prayer is undertaken to advance religion but, in this case (unlike in *Lee*), the religious acts and motives are not those of the government.

The fact that the audience at the graduation ceremony was in some sense captive is also irrelevant. The Establishment Clause does not prevent private individuals from engaging in religious acts and expression even if the audience is captive. Government cannot engage in religious acts and expression even if the audience is not captive.[14] What is important is not

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[14] *But see Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (government employment of military chaplain does not violate the Establishment Clause because government has plenary control over military personnel movement and chaplains are necessary for soldiers to continue practicing their religion).

where the religious exercise is performed, or where the religious idea is expressed, but who performs or directs the performance of that act and who expresses or directs the expression of that idea.

The Establishment Clause limits the power of government to promote or engage in religious activity. Where the impetus for religious activity is purely of private initiative and design, however, there is no state action and the Establishment Clause does not proscribe the conduct. This is true even if there is government assistance so long as the criteria for receiving that assistance are neutral with respect to religion.

4. The Decision Below Conflicts with Numerous Decisions of this Court Construing the Free Speech Clause of the First Amendment.

The panel majority for the Ninth Circuit erred in concluding that this Court's Free Speech precedents were inapplicable to this dispute. The court reasoned that the school, by hosting the graduation ceremony and delegating to students virtually complete control over the content of the ceremony, did not create an open forum.[15] App. B, at 26-28. The court concluded that

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[15] Had the court below upheld the student-initiated invocation and benediction, it would have been unnecessary for the court to conclude that the school had created an open forum. Even if the First Amendment does not protect students from censorship of their graduation speeches, the school district nonetheless might decline to censor speakers at the graduation ceremony in consideration of First Amendment principles. There is no obligation on school officials to censor student expression to the full extent permitted by the First Amendment.

The converse is not true, however. If the graduation ceremony is an open forum or a limited public forum (or, as explained *infra*, even a non-public forum), then school officials cannot prohibit student-initiated religious expression. This Court has repeatedly held that when public school students engage in religious expression, the Establishment Clause does not prevail over the Free Speech Clause and authorize the suppression of such expression. *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981); *Board of Education*

the graduation ceremony was not an open forum because only certain selected individuals (those whom the students chose) addressed the audience. App. B, at 27. However, under well-settled law, a public forum may be created for use only by certain speakers, and the fact that the government discriminates among speakers does not defeat the claim that a public forum has been created and thereby open the door to viewpoint-based speech restrictions. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 806 (1985); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47-48 (1983).

Assuming for purposes of argument that District 241 did not create either an open or limited public forum at its high school graduation ceremonies, a rule prohibiting student-initiated religious expression,[16] and only religious expression, would still contravene this Court's Free Speech precedents. Even in non-public fora, government is prohibited from regulating expression based on viewpoint.[17] In *Lamb's Chapel v.*

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of Westside Community School v. Mergens, 496 U.S. 226, 247 (1989); *cf. Norwood v. Harrison*, 413 U.S. 455, 469-70 (1973) (justifying prior decision of Supreme Court upholding government loan of textbooks to sectarian school students against Establishment Clause challenge on the ground that countervailing Free Exercise Clause concerns warranted such a result).

[16] It has been suggested by one commentator that there is a distinction between verbal acts of worship, such as prayer, and religious expression. Comment, *Student-Initiated Religious Expression*, U. Chi. L. Rev. 1565, 1583-84 (1994). This distinction was suggested by Justice White in his dissent in *Widmar v. Vincent*, 454 U.S. 263, 283-84 & n.2 (1981) (White, J., dissenting). This Court explicitly rejected that view, labelling it novel, unintelligible, and unprincipled. *Id.* at 269 n.6. Justice White's view articulated in *Widmar* has not resurfaced in any subsequent decisions. Although he was the sole dissenter in *Widmar*, Justice White wrote for a unanimous Court in striking down similar restrictions on religious expression on public school property in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993).

[17] *Int'l Soc. for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705-06 (1992); *Cornelius*, 473 U.S. at 800, 806 (both cases quoting *Perry*, 460 U.S. at 45).

Center Moriches Union Free School District, 113 S. Ct. 2141 (1993), this Court held that a school district violated the Free Speech Clause of the First Amendment by denying a religious group access to public school premises solely because the group intended to use the building to show a film that dealt with an otherwise permissible subject from a religious perspective. The Court held that speech restrictions that target religious expression discriminate based not only on subject matter (which in some types of fora might be permissible) but also on viewpoint (which is impermissible regardless of the type of fora). 113 S. Ct. at 2147. This Court rejected the argument that the restriction was viewpoint-neutral because all religions and all religious uses were treated alike. *Id.*

The Ninth Circuit decision below also cannot be reconciled with this Court's decision in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). *Tinker* involved two high school students and a junior high school student who were suspended from school because they refused to remove black arm bands worn to protest the Vietnam War. This Court held that school officials could not restrict student-initiated expressive conduct unless the expressive conduct could be shown to undermine the discipline of the school or collided with the rights of other students to be secure and let alone. *Id.* at 508.

In this case, the Ninth Circuit dismissed the students' Free Speech and Free Exercise claims because (1) students were free to worship outside the graduation ceremony, App. B, at 32; (2) only a very limited number of students could address the audience and, thus, the forum was closed for many students, App. B, at 27; (3) the ceremony was not entirely voluntary, App. B, at 27; (4) school officials participated in the graduation ceremony by attending and presenting diplomas, App. B, at 27-28; and (5) the protections of the Free Speech Clause are "inapposite" when in conflict with the proscriptions of the Establishment Clause, App. B, at 32.

The arguments accepted by the Ninth Circuit for dismissing the students' Free Speech claims were rejected by this Court in *Tinker*. It was no defense that the plaintiffs in *Tinker* could have protested the Vietnam War before and after school. Neither can it be plausibly argued that the fora created by Grangeville High School or the other high schools of District 241 are less open than was the classroom in *Tinker*. Presumably, teachers at the high school and junior high school in *Tinker* exercised far more control over student expression than was exercised by the Grangeville High School officials at the graduation ceremony. Classmates of the *Tinker* plaintiffs were no less "captive" than were those who attended the Grangeville High School commencement exercises. In *Tinker*, objecting students could (and in fact did) express their disagreement at appropriate times and in appropriate manners, but they were expected to "endure" the message that their peers sought to communicate by wearing the black arm bands. Finally, apart from *Tinker*, this Court has in other cases refused to construe the Establishment Clause to authorize government to censor student-initiated religious expression. *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993); *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226, 247 (1989); *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981). The abstract risk of an Establishment Clause violation is precisely the type of vague and ill-defined fear that the *Tinker* Court held was insufficient to justify abridgement of students' Free Speech rights. *Tinker*, at 513-14.

The Ninth Circuit further erred in focusing on the fact that the decision to include an invocation and benediction in the graduation ceremony was reached by majority vote of the students. App B, at 22-23, 27. It is perhaps an arguable question whether a public high school can delegate to one or more students all decisions regarding the content of the school's annual graduation ceremony without simultaneously limiting that delegation with religious content restrictions. But it would

seem irrelevant, once that delegation is effected, what process the students undertake to arrive at these decisions. Justice Souter, in a concurring opinion in *Lee v. Weisman* joined by Justices Stevens and O'Connor, wrote:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

Lee, 112 S. Ct. 2649, 2678 n.8 (Souter, J., concurring). If, as these three members of this Court have suggested, it is permissible for a valedictorian to include a religious message in his or her valediction, it is hard to see how such a unilateral dictate is constitutionally preferable to a similar decision arrived at by majority vote of all graduating students.

The Ninth Circuit apparently misapplied Justice Jackson's immortal language in *West Virginia State Board of Education v. Barnette*:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts .... One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943), *quoted in Harris*, App. B, at 22-23. This Court's decision in *Barnette* will not support the position taken by Respondents and accepted by the Ninth Circuit. *Barnette* was not an Establishment Clause case; it was a Free Speech case. *Barnette* held that school officials could not compel students to salute the flag and recite the Pledge of Allegiance (which includes the phrase "one Nation under God").

The *Barnette* decision certainly did not stop other school children from reciting the Pledge, and West Virginia school children continue to recite the Pledge each day. The Barnette children merely were excused from reciting the Pledge. Arguably, they also could have been excused from the classroom so as to avoid hearing others recite the Pledge. But to the extent objectors elect to remain in the classroom while their classmates recite the Pledge, these objectors can be expected to maintain "respectful silence." The *Barnette* decision, therefore, is best understood not as forbidding exposure to an objectionable creed while in public school, but as forbidding only one method of state-directed indoctrination — compulsory verbal affirmation. The Ninth Circuit erred in concluding that this Court's decisions in *Barnette* and *Lee* protect students from exposure to the religious creeds of their classmates expressed at public school ceremonies.

5. The Decision Below Undermines the Purposes of the First Amendment

The Ninth Circuit's majority opinion creates a new and portentous rule: a school district may allow graduating seniors to decide the content of their graduating ceremony, but it must "take back its permission in part" so as to forbid any religious expression. App. B, at 32-33.

Neither the court below nor the any of the litigants in this case have suggested that had the students selected a graduation speaker and directed him or her to express political, economic, scientific, or philosophical ideas or theories, those ideas would inexorably bear the government's imprimatur. No one suggests that a school district endorses everything uttered at its commencement ceremonies. According to the Ninth Circuit's reasoning, expression which is unendorsed and uncoercive if secular, is endorsed and coercive if religious — even where the school district exercises no control over the content of graduation speeches and affirmatively disclaims any endorsement.

The decision of the Ninth Circuit majority is portentous for what it says about religious expression — that it does not merit the same First Amendment protection as other expression merits. It is portentous for what it requires the school district to do — to examine the content of graduation speeches, to determine the religious significance of various portions of the speeches, and to eliminate any portions that a court might subsequently determine to be religious, and thereby to entangle itself deeply in the religious expression of its students. It is portentous for its remonstrance of those who would communicate religious ideas, that they "must respect the constitutional rights of others" and refrain from such communication, *see* App. B, at 33, but no one need be concerned about respecting *their* constitutional rights of expression. It is portentous for its equating a school district's decision *not to censor* student-initiated religious speech at a graduation ceremony with *government establishment* of religion.

Despite the Ninth Circuit's confidence that the District Court "will have little difficulty fashioning a remedy," *see* App. B, at 32, this issue and this litigation cannot end here. The Ninth Circuit brushed aside the questions brought to its attention regarding the extent to which the Establishment Clause requires school districts to police graduation speeches to remove objectionable religious references. Must all graduation speeches receive prior review and approval? Can there be no extemporaneous graduation speeches? Is it sufficient for schools simply to announce that religious speech is impermissible? What are school officials required to do if the valedictorian or other graduation speaker defies the prohibition, departs from the approved text, and expresses impermissible religious ideas?[18]

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[18] *See ACLU Sued Over Graduation Prayer*, PR Newswire (June 8, 1993) (describing one Tennessee high school's graduation ceremony where the students spontaneously recited, en masse, *The Lord's Prayer*).

No party to this litigation has suggested that the school district somehow encouraged or compelled graduating seniors to utter religious ideas or words. There is, therefore, no need to restrain the school district from advancing or endorsing religion. From the beginning, this case has been about how to extend the Establishment Clause to suppress the religious expression of private citizens. That has been accomplished by the Ninth Circuit in the decision below.

CONCLUSION

For the foregoing reasons, Cross-Petitioners respectfully request that this Cross-Petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted and the case set for plenary review.

Respectfully submitted,

Stanley D. Crow
Counsel of Record
3776 LaFontana Way
P.O. Box 972
Boise, Idaho 83701-0972
(208) 345-7561

Alexis I. Crow
John W. Whitehead
Mark J. Beutler
THE RUTHERFORD INSTITUTE
1445 East Rio Road
P.O. Box 7482
Charlottesville, VA 22901
(804)978-3888

Co-Counsel for Cross-Petitioners

January 31, 1995

A UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5368

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, ETC., *et al.*

v.

BLACKHORSE PIKE REGIONAL BOARD OF EDUCATION, *et al.*
ACLU-NJ and Edward Ross,

Appellants

(DNJ (Camden)) D.C. Civil No. 93-02651 (JI);

PRESENT: STAPLETON AND NYGAARD,
Circuit Judges

ORDER

It appearing to the court, based on the facts accepted by the district court as the basis of its decision, that:

(1) the graduation ceremony is a school sponsored event; the fact that the school board has chosen to delegate the decision regarding one segment of the ceremony to the members of the graduating class does not alter that sponsorship, does not diminish the effect of a prayer on students who do not share the same or any religious perspective, and does not serve to distinguish, in any material way, the facts of this case from the facts of *Lee v. Weisman*, 112 S. Ct. 2649 (1992);

(2) in light of *Lee v. Weisman*, *supra*, the appellants are likely to prevail;

(3) the appellants will suffer irreparable harm if an injunction pending appeal is not granted, *Kirod v. Burn*, 427 U.S. 347 (1976);

(4) the issuance of an injunction pending appeal will not occasion injury to the appellees or to the public sufficient to outweigh the irreparable injury that will occur to appellants if that relief is not granted;

Now, therefore, IT IS ORDERED that until further order of this court, appellees, their agents and employees, and all those voting in concert with them are hereby enjoined from conducting a school sponsored graduation ceremony that includes a prayer whether it be an invocation, a benediction or a prayer in any other form.

By the Court,

Walter K. Stapleton
Circuit Judge

Dated: June 25, 1993